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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

## Nos. 879, 909 & 936

No. 879

SOUTHERN PACIFIC COMPANY,
a railroad corporation, Intervener,
*Petitioner*,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
*Respondents*.

No. 909

WALTER E. MEYER, Intervener,
*Petitioner*,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
*Respondents*.

No. 936

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
a Corporation, Debtor,
*Petitioner*,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,
*Respondents*.

**BRIEF OF PROTECTIVE COMMITTEE FOR HOLDERS OF ST. LOUIS SOUTHWESTERN RAILWAY COMPANY FIRST TERMINAL AND UNIFYING MORTGAGE BONDS, INTERVENER, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.**

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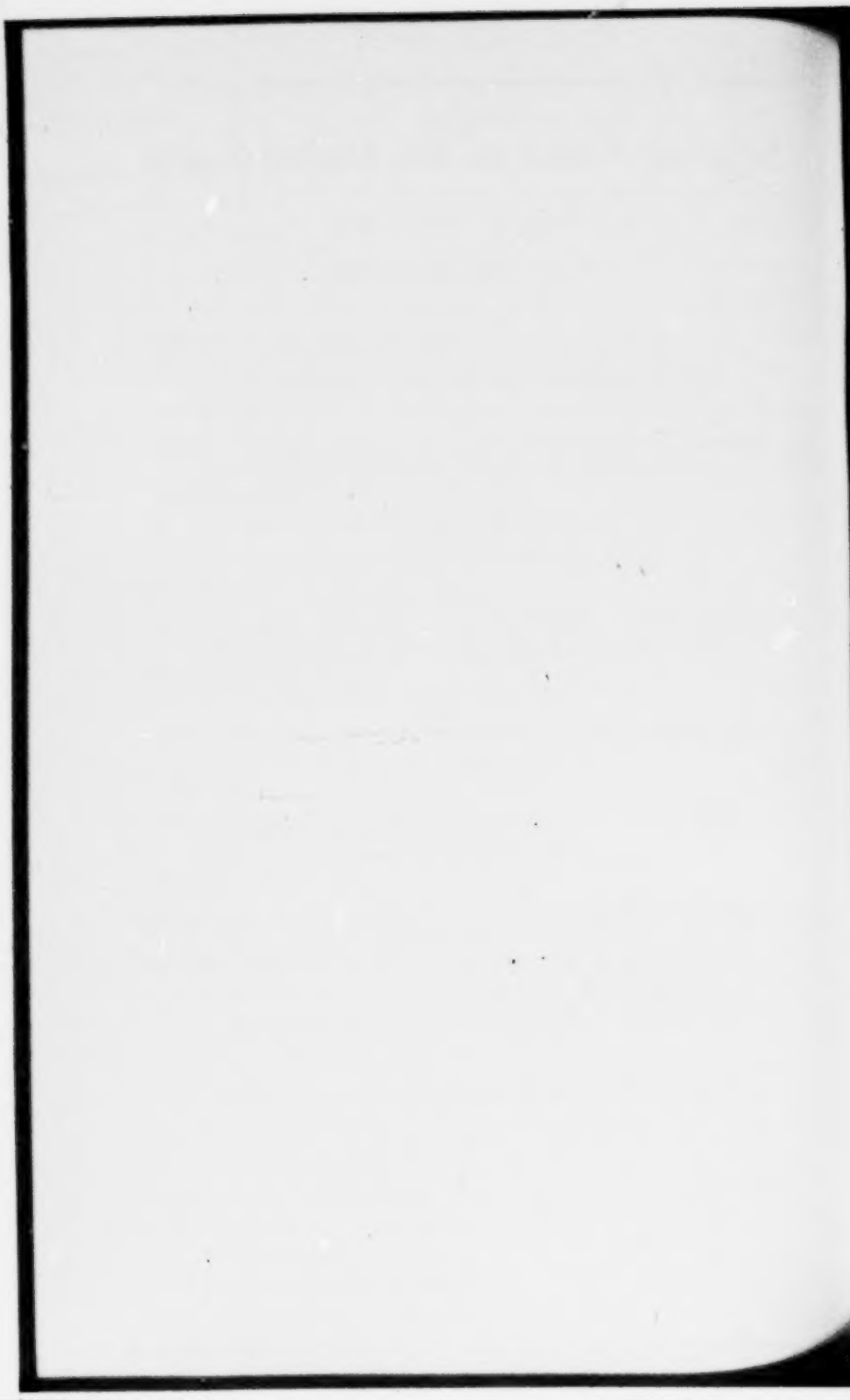

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### OPINIONS BELOW.

The opinion of the Circuit Court of Appeals herein (R. 5559-5680) is reported at 157 F. (2d) 337. The opinion of

the District Court (R. 5183-5212) is reported at 53 F. Supp. 914. The initial Report of the Interstate Commerce Commission (R. 3495-3735) is reported at 249 I. C. C. 5, and its Supplemental Report (R. 3736-3820) at 252 I. C. C. 325.

## STATUTES INVOLVED.

Because of their length, Sections 77(d), (e) and (g) of the Bankruptcy Act (11 U. S. C. sec. 205(d), (e) and (g)) are printed as Appendix A to this brief.

## SUMMARY OF ARGUMENT.

I. The contentions of Walter E. Meyer contained in Points I, II and III of his brief, were fully considered and properly decided by the Interstate Commerce Commission, by the District Court and by the Circuit Court of Appeals, and there is, therefore, no reason for this Court to exercise its discretion to review.

II. It was within the discretion of Judge Moore to deny the motion of Walter E. Meyer for new hearings, and such discretion was properly exercised.

III. The question *vel non* the debtor is now solvent, is irrelevant and immaterial in this reorganization.

IV. The so-called "changed conditions" were in the contemplation of the Interstate Commerce Commission at the time it formulated the plan of reorganization.

## ARGUMENT.

### POINT I.

**The contentions of Walter E. Meyer contained in Points I, II and III of his brief, were fully considered and properly decided by the Interstate Commerce Commission, by the District Court and by the Circuit Court of Appeals, and there is, therefore, no reason for this Court to exercise its discretion to review.**

In *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, (1943) 318 U. S. 523, 545, this Court said:

> "Elimination of delay in railroad receivership and foreclosure proceedings was one of the purposes of the enactment of §77. Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island and Pacific R. Co., 294 U. S. 648, 685. Section 77(g) giving the District Court power to dismiss the proceedings for 'undue delay in a reasonably expeditious reorganization' was inserted in recognition of 'the necessity of prompt action'. (H. Rep. No. 1283, 74th Cong. 1st Sess. p. 3) We cannot conclude that in this proceeding which already has been pending seven years and which was before the Commission for over four years, the interests of junior claimants have been sacrificed for speed."

These proceedings were first instituted on December 12, 1935 (R. 24-32). Sixteen months later, by April 24, 1937, all plans of reorganization had been filed and hearings completed before the Interstate Commerce Commission (R. 3497). This initial expedition ended with those hearings when the delaying activities of Mr. Meyer started. Those activities were succinctly set forth on pages 9 to 16 inclusive of the "Brief of Southern Pacific Company, in Reply to Brief of Appellant Walter E. Meyer, in Reply to Motion for Stay or Remand by Appellant Walter E. Meyer,

and in Respect of Amicus Brief of the United States" dated March 19, 1945, and filed with the United States Circuit Court of Appeals for the Eighth Circuit. Rather than paraphrase that concise historical statement, it is quoted here in full:

> "As to the proceedings before the Commission: On December 7, 1936, within the time allowed therefor, the Debtor filed a plan of reorganization with the Commission, and other plans were filed by other parties (R. 3496). Hearings upon the plan of reorganization were held on March 16, 1937, were recessed, and were concluded on April 24, 1937 (R. 3497). At these hearings, the Appellant Meyer presented various contentions and charges against Southern Pacific Company, which were summarized and disallowed in the proposed report of Examiner J. V. Walsh, filed February 7, 1938 (R. 255, 306-314). The case was argued upon exceptions to the proposed report on May 16, 1938 (R. 3496). A petition was filed in April, 1937, by Appellant Meyer for an investigation by the Commission and for such other relief as might seem meet in respect of his charges against Southern Pacific Company and others (R. 339 to 351). This was amplified by a supplemental petition filed in June, 1937 (R. 357 to 467), in which the prayer requested, in addition to an investigation, an opportunity for the petitioner to introduce evidence at reopened hearings. The Commission on January 25, (*sic*) 1939, entered an order reciting the petition by Appellant Meyer and directing that the proceeding be reopened, 'with respect to the matters alleged in said petitions, in so far as they may be relevant and material in this proceeding' (R. 501). A hearing pursuant to this order was held from May 5, 1939, to May 27, 1939, and from September 18, 1939, to September 30, 1939 (R. 3549). At these hearings, Meyer presented his case relative to his charges against Southern Pacific Company and others, and his adversaries presented testimony on their part. The hearings were conducted by Commissioner Clyde B. Aitchi-

son and Examiner Walsh. On June 30, 1941, the Commission issued its report, one Commissioner dissenting on this phase, in which it generally and specifically found against each and every contention of the Appellant Meyer (R. 3547 to 3678). A petition for modification was filed by the Appellant Meyer, along with petitions by others for modification of other phases of the report, and the Commission on March 9, 1942, issued its supplemental report maintaining and elaborating upon its findings against Meyer's contentions (R. 3742 to 3752).

"As to the proceedings in the Court below: We have referred to the pleas by Appellant Meyer and others in opposition to the petition for reorganization and the findings of December 31, 1935, made by the Honorable Charles B. Davis sitting in the Court below, overruling his contentions (R. 87 to 93). In accordance with Title 11, U. S. C. A., §205(c)(7), directing that the judge shall promptly determine and fix the time within which claims may be filed and the manner in which they may be evidenced and allowed, the Court by its Order No. 28, dated February 5, 1936 (R. 3953 to 3955), and by its Order No. 81, dated May 22, 1936 (R. 3955 to 3961), fixed times and procedures in respect of the filing of claims. By its Order No. 184, dated April 13, 1937, it provided an extended time for the filing of protests and objections to allowances of any claims which had been filed. This Order read (R. 3962):

> "'1. That the time within which parties in interest may file protests or objections to the allowance of any claims for which proofs of claim have been filed herein, be and it hereby is extended (a) as to proofs of claim of mortgage trustees or others filed under the provisions of Order No. 81, to and including May 15, 1937, and (b) as to all other proofs of claim, to and including July 15, 1937.'

By its Order No. 272, dated February 25, 1938 (R. 3962 to 3965), it referred the determination of claims to the Honorable Marion C. Early, Special Master. Pursuant

to these orders, the Reconstruction Finance Corporation, on March 18, 1936, filed its claim in respect of the indebtedness of the St. Louis Southwestern Railway Company to it on account of note for the principal sum of $17,882,250 and for interest thereon (R. 3965 to 3975). Upon the payment by the Southern Pacific Company of this note, guaranteed as to collection by it, the Reconstruction Finance Corporation assigned the note and claim to Southern Pacific Company, which assignment was filed with the Court July 21, 1936 (R. 3975 to 3981). Within the time allowed therefor, two corporations, Anglo-Continentale Treuhand, A. G., and Mondiale Handels-und Verwaltungs, A. G., filed protests to the assigned claim held by Southern Pacific Company (R. 3982 to 3984). After extended hearings, the Master, Marion C. Early, filed with the Court on August 25, 1939, his findings of fact and conclusions of law (R. 3985 to 3995). His findings include the following (R. 3991):

> " 'The St. Louis Southwestern Railway Company was operated as a separate and distinct corporation, and its accounts and affairs were not commingled in any way with those of Southern Pacific Company, and its officers, including that of President, devoted their entire time to its affairs, while Messrs. Holden and McDonald, who also held positions with Southern Pacific Company, devoted only a portion of their time to the affairs of the St. Louis Southwestern Railway Company. Southern Pacific Company made no loans or advancements to St. Louis Southwestern Railway Company, but its Board of Directors adopted a resolution in January, 1935, to advance it loans on open account not to exceed in the aggregate $100,000.00. No advancements or loans were made, however, under authority of this resolution.
>
> " 'Claimant, the Southern Pacific Company, and St. Louis Southwestern Railway Company were at all times conducted as independent corporations, kept separate books, and the funds of the

two companies were never commingled, and I find that Claimant did not overreach, coerce or take any advantage of Debtor, St. Louis Southwestern Railway Company, by reason of the fact that it owned approximately 87 per cent of its capital stock.'

The Master recommended that the claim be allowed (R. 3994). Exceptions were taken to the report of the Special Master by the protestant corporations (R. 3996), and the Court, upon submission of the matter to it, on January 26, 1940, held that the report of the Special Master should be sustained, the protests disallowed, and the claim of Southern Pacific Company allowed (R. 4002, 4003). No appeal was taken to this Court from this order by any party to these proceedings. On March 23, 1942, the Commission, as provided by Title 11, U. S. C. A., §205(e), certified the plan of reorganization, as modified by its supplemental report, to the Court below (R. 3494). On May 29, 1942, appellant Walter E. Meyer, among others, filed objections in the Court to the plan of reorganization (R. 3840). These objections contained various charges against the Southern Pacific Company and requested, among other things, that the interest of Southern Pacific Company as a creditor and stockholder be expunged or at least subordinated to all other creditors and stockholders of the Debtor (R. 3842). On June 9, 1942, Meyer was permitted to intervene as a party to the proceedings in the Court below (R. 4006). After the overruling on July 13, 1942, of a motion by the appellant Meyer to take further testimony and obtain further documentary evidence, for the reason that his motion tended to unduly enlarge the subject matter of the inquiry and was calculated to retard and prolong the consideration of the plan of reorganization (R. 4007), the plan of reorganization and the various objections thereto came on for hearing on October 26, 1942 (R. 4051). A great deal of testimony was introduced, principally by the appellant Meyer. The hearing, which

was before Judge Davis, was concluded on November 5, 1942 (R. 4993), with provision for additional arguments to be made at a later date for appellant Meyer and the Debtor, and for the filing of briefs by all the parties. Subsequently, before these arguments were made and briefs filed, Judge Davis died, and Judge Moore called the parties for a conference on April 23, 1943, to ascertain their views as to further procedure (R. 5137). All the parties interested except Meyer urged Judge Moore to consider the case upon the record as certified to the Court by the Commission and upon the evidence as taken by Judge Davis. Appellant Meyer took the position that there should be a new trial before Judge Moore (R. 5170, 5179), although he did not object to the Court considering the testimony which had been taken, provided that he could introduce new testimony (R. 5170, 5180). After the conference the Court entered an order (R. 5181-5183) taking the case as submitted on the record as made before the Commission and on the testimony as taken before Judge Davis, with provision for oral argument on May 31, 1943, and for briefs. There was a provision in the order that the Court would entertain any motion of any party for the taking of additional testimony or otherwise pertaining to the completion of the record (R. 5182). In accordance with this order, all of the parties so desiring argued the case before Judge Moore and filed briefs. Appellant Meyer argued orally and filed briefs with Judge Moore but filed no motion for the taking of additional testimony or otherwise as to the completion of the record. On February 9, 1944, Judge Moore rendered his opinion and order approving the plan of reorganization and overruling all of the objections thereto, including those of the appellant Meyer (R. 5183 to 5213). On March 9, 1944, Meyer filed his notice of appeal to this Court from this judgment (R. 4).

"This Court should also have before it an outline of the Appellant Meyer's connection with the Debtor.

"Mr. Meyer, a member of the Bar of the State of New York since 1903 (R. 1350), made an investment in St. Louis Southwestern Railway Company stock as early as 1920 (R. 530). Thereafter he dealt heavily and extensively in St. Louis Southwestern Railway Company stock, buying and selling, but on the balance being a purchaser (Meyer's Exhibit No. 262 before the Commission, R. 1049), so that his total investment became $964,319.20 (R. 531). He was also an active investor in other properties and had other business interests (R. 1350 to 1351). However, a large share of his time was given over to the St. Louis Southwestern (R. 1351). He intervened as a party, in opposition to the management of the St. Louis Southwestern Railway Company, in many proceedings before the Commission (R. 533). He continuously objected to the conduct of the Railway Company's affairs by the management and circularized at times the stockholders of the St. Louis Southwestern Railway Company. These activities were initiated as early as 1925 and long before the Southern Pacific Company had any relationship with the St. Louis Southwestern Railway Company, other than as a connecting carrier. Examples of these activities, prior to Southern Pacific Company acquisition of stock of the St. Louis Southwestern Railway Company, appear in the record (R. 539, 540, 577, 689). There also appear in the record examples of the observations of prior managements of the St. Louis Southwestern concerning Meyer (R. 699, 712, 716). After Southern Pacific Company acquired the stock of the St. Louis Southwestern Railway Company, these activities continued, but were directed at Southern Pacific Company. Charges against it were circularized among St. Louis Southwestern security holders (R. 835, 838). Not content with this, attacks on Southern Pacific officers who had displeased him, were distributed by Meyer among Southern Pacific stockholders (R. 1032, 1042). These were appropriately answered (R. 1040). The Commission quoted the views of the Debtor's officers of Meyer's conduct in its report (R.

3612, 3613) and reaffirmed its findings in its supplemental report, despite his request that they be stricken (R. 3752). While Meyer was making and publicizing his attacks upon the St. Louis Southwestern management, he was increasing his stockholdings by purchases in the market (R. 634, 1467-1469; *Cf.* R. 1049). Many railroads in the Western territory, national banking houses, and others, were brought within the range of the appellant's attacks. Some ninety-odd persons were defendants in a stockholder's derivative action brought by Walter E. Meyer to recover $30,000,000 in 1934 (R. 1011). The suit was dismissed upon jurisdictional grounds, *Meyer, et al.* v. *Kansas City Southern, et al.*, 11 F. Supp. 937, affirmed (C. C. A. 2d) 84 F. (2d) 411, certiorari denied 299 U. S. 607. Claims of persecution were made against Mr. Henry W. de Forest, a Southern Pacific Company director and officer, although the appellant's contact with him had been slight (R. 1405 to 1415). Of this the Commission says (R. 3566):

> "'Meyer, in support of his charge that the filing of the petition for reorganization was directed by de Forest as an act of resentment and with a fixed determination to destroy the debtor, points to no suggested basis therefor except de Forest's advanced age, and except that he suggests that he may have been instrumental in forcing de Forest's resignation as chairman of the Southern Pacific Company. Testifying at the hearing, April 24, 1937, [R. 173 to 216] in response to Meyer's subpoena, de Forest gave no indication of any resentment or malice toward Meyer; and stated that his resignation was voluntary, and due to his age. At the time of the further hearing, de Forest was deceased. The charge is without foundation, so far as the record shows.'

With the passage of time, the range of attack expanded. Several years ago it came to include the Illinois Central Railroad Company and the Union Pacific Railroad Company which were alleged to dominate the South-

ern Pacific Company, upon grounds tenuous and fantastic (R. 3021 to 3038, 4832 to 4865). Although such charges do not merit serious consideration, it may be noted that the Commission with its usual meticulousness found them unfounded (R. 3551). The Trustee of the Debtor, Berryman Henwood, appointed by the Honorable Charles B. Davis in the Court below, in accordance with the direction of the Court (R. 3902) and the mandate of the statute, Title 11, U. S. C. A., §205(c)(9), rendered reports as to whether or not there were irregularities, fraud, misconduct or mismanagement of the Debtor's affairs. These reports are in the record (R. 3903 to 3951). Because the Trustee did not find as a result of his investigations any facts indicating to him the existence of irregularities, fraud, misconduct or mismanagement, e.g., R. 3950, Appellant Meyer accuses the Trustee of submitting to Southern Pacific Company control (p. 217, his brief), and of being perfunctory in the performance of his duties (R. 1664, 1665) (p. 271, his brief). The Appellant Meyer's brief herein dated February 14, 1945, his motion that appeal be stayed or proceedings remanded dated November 18, 1944, and his accusations directed against parties and counsel in the oral hearings heretofore held in Court, are further developments. The Commission, which had extensive opportunity to observe and study the Appellant Meyer in the hearings before it, made its findings in its report as to the purpose or motive for these activities, as follows (R. 3674):

> " 'Meyer had been made an offer for his stock in the debtor, which we had found sufficient in the Control case, *supra;* and his apparent animating purpose has been to obtain from the Southern Pacific a consideration for his stock in excess of that offer.'

This finding it reaffirmed in its supplemental report (R. 3752)."

Further evidence of the full opportunity afforded Mr. Meyer to present his contentions, and of the full consideration given thereto by the Interstate Commerce Commission, by the District Court and by the Circuit Court of Appeals, is found in their reports and opinions. In the initial report of the Interstate Commerce Commission (*St. Louis Southwestern Ry. Co. Reorganization*, 249 I. C. C. 5, R. 3495-3713), out of the total of 219 pages, 131 pages (R. 3547-3678), or almost 60 per centum of the entire report was devoted to a detailed analysis and consideration of Mr. Meyer's charges. Further, Commissioner Eastman wrote a dissenting report of 19 pages (R. 3713-3732) devoted wholly to Mr. Meyer, but the Commissioner's dissent was based on a desire to reopen the hearings to explore the suggested unification of the Debtor with Southern Pacific Railroad Company (R. 3731-3732) and not on Mr. Meyer's charges. In his dissent he characterized Mr. Meyer's activities in this sentence (R. 3724):

> "Brooding over this succession of events, I think that Meyer has conjured up conspiracies which go beyond the reasonable probabilities of the situation."

In the opinion of the District Court (R. 5183-5212), of the 29 pages of the opinion, 7 (R. 5197-5203) were devoted to Mr. Meyer's claims, or 24 per centum of the total. In the opinion of the Circuit Court of Appeals (R. 5563-5680), 83 pages (R. 5569-5652) out of the total of 117 pages of text, contain detailed consideration of Mr. Meyer's charges, or 70 per centum of the entire opinion.

It thus appears that Mr. Meyer's contentions have been fully presented to and considered by the various tribunals to which he has submitted them. Mr. Meyer, in his Petition for Writ of Certiorari and supporting brief has failed to show any special and important reason to justify this

Court in exercising its discretion to grant the writ. Since this proceeding has been pending more than twelve years and was before the Interstate Commerce Commission for over five years, it does not seem that the interests of the stockholders have been sacrificed by any failure to consider any and all matters presented.

## POINT II.

**It was within the discretion of Judge Moore to deny the motion of Walter E. Meyer for new hearings, and such discretion was properly exercised.**

In substance, what Mr. Meyer sought was an opportunity again to present his case before a new judge, or a new trial. That a successor judge has the power to pass upon a motion for a new trial, has long been upheld in this Court. In *Re The Life and Fire Insurance Company of New York v. The Heirs of Wilson*, 8 Pet. 291, 303 (1833), this Court said:

> "In this case, the district judge seems to think that as the judgment was not rendered by him, he has no power to grant a new trial, as he is not acquainted with the facts and circumstances which should influence his discretion in making such an order; and that, consequently, he is not bound to sanction the judgment by his signature. * * *
>
> "But the district judge is mistaken in supposing that no one but the judge who renders the judgment can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties."

It seems clear, therefore, that Judge Moore had the power to pass upon, and therefore, to refuse, Mr. Meyer's motion for a new trial.

In that event, it is necessary to examine into the question of whether Judge Moore abused his discretion in so exercising that power. The Bankruptcy Act provides (11 U. S. C. §205(d)):

> "The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan."

The only statutory reference to additional evidence before the court is an indirect one in subdivision (e), (11 U. S. C. §205(e)):

> "If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received."

In *Ecker v. Western Pacific Railroad Corporation*, 318 U. S. 448 (1943), this Court clearly set forth its views that the determination of the plan was, in the first instance, for the Commission, and that the court had only a limited review. This was reaffirmed in *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 318 U. S. 523 (1943) and in *Reconstruction Finance Corporation v. Denver & Rio Grande Western Railroad Company*, ..... U. S. ..... (June 10, 1946) (90 L. ed. 1134).

It thus appears that under the statute, as interpreted and applied by this Court, the District Court is to act upon the record before the Interstate Commerce Commission. The District Court, however, in its discretion, may receive addi-

tional evidence. In the *Western Pacific* Case, this Court said (1. c. 477):

> "Thus, while judicial review does not involve an independent examination into valuation, it does require that the court shall be satisfied, upon the record before the Commission, with such additional evidence as may be pertinent to the objections to the Commission's finding of value, that the statutory requirements have been followed."

And in the *Milwaukee* Case (1. c. 542):

> "As we have indicated in the Western Pacific Railroad Corporation Case, the power of the District Court to receive additional evidence may aid it in determining whether changed circumstances require that the plan be referred back to the Commission for reconsideration."

To recapitulate, the District Court is to pass upon the plan upon the record before the Interstate Commerce Commission with such additional evidence, if any, as the court may see fit to receive. Therefore, as to the record before the Commission, Judge Moore was in the same position as Judge Davis. The only ground for error, therefore, would be Judge Moore's action in considering the record made before Judge Davis.

It would appear to be patently absurd to further delay this reorganization where a part of the record was made before an administrative body and a part before another judge of the same court, because such latter part was not made before the judge who acted. This absurdity is emphasized by the further facts that undoubtedly the judge could have had the testimony taken before a master, that the Judge who acted heard arguments by all interested parties, and that he expressed himself as willing to receive motions "respecting the taking of additional testimony or otherwise pertaining to the completion of the record on

said Plan" (R. 5182), but no one, not even Mr. Meyer, made any such motion.

If Judge Moore had disregarded the testimony introduced before Judge Davis, Judge Moore would have complied strictly with the statute, and since no motion had been made to him respecting additional testimony, he could not be said to have abused his discretion by refusing to receive further testimony. Nor can he be held to have abused his discretion by acting on one transcript (from the Interstate Commerce Commission) and refusing to reject another (before Judge Davis), particularly when the witnesses in the different hearings were substantially the same, and most of the evidence before Judge Davis was documentary.

## Point III.

**The question vel non the debtor is now solvent, is irrelevant and immaterial in this reorganization.**

The three petitioners before this Court urge that subsequent to the Supplemental Report of the Interstate Commerce Commission (R. 3736), the assets of the debtor exceed its liabilities, i. e., that the debtor is "solvent" in the bankruptcy sense, and, therefore, that any plan which deprives the stockholders of the equity resulting from this "solvency" is an unfair plan which cannot be confirmed. This contention is based on a fundamental misconception of the purposes and provisions of the Bankruptcy Act (11 U. S. C. §205).

No part of these proceedings has been based upon any question of solvency in the bankruptcy sense. The original petition of the debtor only alleged "that it is unable to meet its debts as they mature" (R. 26). The Interstate Commerce Commission has made no finding that the debtor was insolvent, instead, its finding (R. 3700) was that stockholders could not participate in the reorganized com-

pany because their equities "have no value". The District Court, in its opinion approving the plan, made no specific finding relating to the debtor's solvency, but after discussing the matter, said "the Court is satisfied * * * that the findings made by the Commission * * * including its findings as to debtor's prospective earning power, the valuation and capitalization permissible for the purposes of this reorganization are supported by the entire record, * * *." (R. 5211-5212).

This procedure is within the clear intent of the statute that the permissible capitalization of the reorganized Company in railroad reorganizations is based primarily upon earning power. Section 77(e) provides (11 U. S. C. §205 (e)):

> "*Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, * * *."

The last clause, above quoted, has no meaning if it were to be construed as a mere repetition of the preceding clause as to insolvency.

The finding that an equity has no value is based upon earning power. This Court has so interpreted the act in *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, supra*, 1. c. 540-541, as follows:

> "We recently stated in *Consolidated Rock Products Co. v. DuBois*, * * * *supra*, in connection with a reorganization of an industrial company, that the 'criterion of earning capacity is the essential one if the industry is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable.' p. 526. That is equally applicable to a rail-

road reorganization. * * * The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn. Earning power was the primary test in former railroad reorganizations under equity receivership proceedings. *Temmer v. Denver Tramway Co.*, (CCA 8th) 18 F. 2d. 226, 229; *New York Trust Co. v. Continental & C. Trust & Sav. Bank*, (CCA 8th) 26 F. 2d. 872, 874. The reasons why it is the appropriate test are apparent. A basic requirement of any reorganization is the determination of a capitalization which makes it possible not only to respect the priorities of the various classes of claimants but also to give the new company a reasonable prospect for survival. See Commissioner Eastman dissenting, Chicago, M. & St. P. Reorganization, 131 I. C. C. 673, 705. Only 'meticulous regard for earning capacity' (*Consolidated Rock Products Co. v. DuBois, supra*, p. 525) can afford the old security holders protection against a dilution of their priorities and can give the new company some safeguards against the scourge of overcapitalization . Disregard of that method of valuation can only bring, as stated by Judge Evans for the court below, 'a harvest of barren regrets'. 124 F. 2d. p. 765. Certainly there is no constitutional reason why earning power may not be utilized as the criterion for determining value for reorganization purposes. And it is our view that Congress when it passed Section 77 made earning power the primary criterion. The limited extent to which Section 77(e) provides that reproduction cost, original cost, and actual investment may be considered indicates that (apart from doubts concerning constitutional power to disregard them) such other valuations were not deemed relevant under Section 77 any more than under Section 77 B 'except as they may indirectly bear on earning capacity'. *Consolidated Rock Products Co. v. DuBois, supra*, p. 526."

If, therefore, earning power is the criterion, it is certainly conceivable that there might be situations where a highly solvent company produced only small returns, and

could only produce such small returns. In such instances, the application of the correct criterion of earnings might wipe out a value which would be obtainable by the equity owners on a liquidation if the assets were saleable at or near their book values. Such result would be necessary if the business was to be continued at all. The reverse situation, where a liquidation would produce nothing for the equity owners but where there were foreseeable earnings allocable to such equity, has been considered by this Court, and the equity holders allotted participation in the reorganized company. See *Otis & Co. v. Securities & Exchange Commission*, 323 U. S. 624 (1945).

As pointed out above, the base on which these proceedings were instituted and conducted, was that the debtor was unable to meet its debts as they mature. Despite the war earnings and the changes in the debtor's financial condition, this situation still exists. Appendix A to the debtor's petition herein shows net current assets of $22,090,504 out of which, of course, the debtor must retain a sufficient sum for working capital. Against this, there are overdue debts of $38,303,211 made up as follows:

| | |
|---|---|
| First Terminal & Unifying Mortgage Bonds[1] | $ 8,063,000 |
| Chase National Bank Note | 3,500,000 |
| Mississippi Valley Trust Company Note | 1,000,000 |
| Reconstruction Finance Corporation Note (bought by Southern Pacific) | 17,882,250 |
| Stephenville N. & S. T. R. Co. Bonds | 2,234,903[2] |
| Central Ark. & E. R. Co. Bonds | 932,232[2] |
| Total interest in default | 4,690,826 |
| | $38,303,211 |

[1] The maturity of these bonds was accelerated by Guaranty Trust Company, Trustee.

[2] These figures are from the opinion of the Circuit Court of Appeals, below, 157 F. 2d. 337, 402-403.

Thus, for two reasons, whether or not this debtor is solvent in the bankruptcy sense, is irrelevant and immaterial. First, these proceedings are based on inability to meet debts as they mature, a condition which still exists. Second, regardless of solvency, any capitalization must be one which the earnings can support.

## POINT IV.

**The so-called "changed conditions" were in the contemplation of the Interstate Commerce Commission at the time it formulated the plan of reorganization.**

The three petitioners contend that changed conditions, in the form of "solvency" of the debtor and increased earnings make the plan inequitable now, and require its referral back to the Interstate Commerce Commission. Their point relative to solvency was discussed under Point III above, which discussion will not be repeated. As to the increased earnings, none of the petitioners contend that the plan was inequitable for that reason at the time the plan was formulated by the Commission or certified to the District Court.

The Bankruptcy Act provides (11 U. S. C. §205(e)):

> "*Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that *at the time of the finding*[3] the corporation is insolvent, or that *at the time of the finding* the equity of such class of stockholders has no value, * * *.
>
> "*Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that * * * *at the time of the finding* the interests of such class of creditors have no value, * * *."

[3] All italics in quotations herein are supplied unless the contrary is indicated.

Thus, the Bankruptcy Act provides that the cut-off date for determining the interest of a claimant, whether a creditor or a stockholder, is *the time of the finding* thereon by the Commission. Thus the cut-off date is fixed by the statute at a time when the reorganization is still before the Interstate Commerce Commission. The District Court is not required by the Bankruptcy Act to make a new finding. All it may do is affirm "the finding, * * * that at the time of the finding the equity of such class of stockholders has no value, * * *." The petitioners herein do not attack the finding of the Interstate Commerce Commission at the time the finding was made. Therefore the basis for their contentions arising out of "changed conditions" must arise out of reliance upon the general equity powers inherent in a court of bankruptcy.

Such inherent powers are also recognized by the Bankruptcy Act (11 U. S. C. §205(e)):

> "Upon the certification of a plan by the Commission to the court, * * * such parties shall file, * * * detailed and specific objections in writing to the plan *and their claims for equitable treatment.*"

Such is also the necessary effect of the decisions of this Court in *Ecker v. Western Pacific Railroad Corporation, Supra; Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., supra;* and *Reconstruction Finance Corporation v. Denver & Rio Grande Western Railroad Company, supra.*

In the *Western Pacific* Case, this Court considered the contention of changed conditions, but decided that the claimants for equitable treatment had not shown any such changed conditions as would justify disapproval of the Commission plan (1. c. 509):

> "The Commission's forecast was made with knowledge and not in disregard of past fluctuations of in-

> come, in war and in peace. On the showing as to changed conditions made before the District Court, there was no basis for a disapproval of the Commission plan as unfair to the junior equities. The further evidence of increased earnings, placed in the record by the stipulations, does not lead us to reject the Commission's plan."

In the *Milwaukee* Case, the contention was similarly handled (1. c. 543-544):

> "We agree with the Circuit Court of Appeals that no sufficient showing of changed circumstances has been made which requires the District Court to return the plan to the Commission for reconsideration. * * * As we have noted, the Commission conceived as its responsibility the devising of a plan which would serve 'as a basis for the company's financial structure for the indefinite future.' We cannot assume that the figures of war earnings could serve as a reliable criterion for that 'indefinite future'. As some of the bondholders point out, the bulge of war earnings per se is unreliable for use as a norm unless history is to be ignored; and numerous other considerations, present here as in former periods, make them suspect as a standard for any reasonably likely future normal year. * * * In view of these considerations *we cannot say that the junior interests have carried the burden which they properly have* of showing that subsequent events make necessary a rejection of the Commission's plan."

Those two cases, as the present one, involved attacks upon the approval of a plan, and the reliance upon the general equity power of the court is not clearly pointed up. However, the *Denver & Rio Grande* Case was squarely bottomed on that power.

In that case, the order subject to review was one confirming a plan which had not received the required number of acceptances, such confirmation being based upon a find-

ing that such non-assenting creditors were not "reasonably justified" (11 U. S. C. §205(e)) in failing to accept the plan. In determining whether such creditors were "reasonably justified" it was necessary for the court, in the absence of statutory guidance, to exercise its general equity powers. In upholding the confirmation of the plan, this Court said (1. c. 90 L. ed. 1148):

> "Assuming that the courts, as courts with equity powers in a bankruptcy matter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation, it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanations of the plan."

This Court, however, found that there were no changed conditions which had not been envisaged by the Commission, and therefore held that the non-acceptance of the plan was not reasonably justified.

The position of the petitioners herein, therefore, must be that the Interstate Commerce Commission, in March of 1942 (the date of its Supplemental Report), failed to envisage the extent of the war and post-war earnings of the debtor, and the changes made and which can be made as a result of the large accumulation of earnings. None of the petitioners have stated what must be their basic assumption, i. e., that the increased earnings and their results are so great as conclusively to show that the Commission could not possibly have envisaged them. None of them adduces any facts or arguments to show that the Commission so failed.

In the *Denver & Rio Grande* Case, *supra*, this Court said (1. c. 90 L. ed. 1148-1150):

> "We have pointed out in the section of this opinion dealing with the allocations of the securities that a

part of the compensation to senior claimants for their loss of position was the opportunity to participate in war earnings. This was understood by the District Court and the Commission. Accumulations of cash beyond operating fund needs are in the same category. * * *

"The error of the Circuit Court in its holding set out above lies in its assumption that the senior bondholders were paid in full by the securities allotted to them without also accepting the determination of the Commission that the assets represented as of January 1, 1943, and all subsequent earnings were a part also of the common stock that was awarded the senior bondholders. * * *

"Under our determination that the creditors who received common stock were compensated partly by the assets and future earnings, it is obvious that the use of such assets to retire senior claims is a part of the normal and expected increment from holdings of common stock. * * * When proposed capitalization is being planned on earnings, a reduction of senior capital without reduction of estimated earnings increases possible junior capital within the scheme. When the reduction of senior capital takes place after the adoption of the plan by the use of anticipated earnings or existing cash, there can be no such readjustment of junior participation because assets in the balance sheet at the adoption of the plan and subsequent earnings are, as we have pointed out, for the benefit of the stockholders in the new company so that through these common stock advantages these new stockholders may be compensated for their loss of payment in full in cash."

This policy was reemphasized and reaffirmed by this Court in the second appeal in the *Denver & Rio Grande* Case (*Insurance Group Committee v. The Denver & Rio Grande Western Railroad Company*, ..... U. S. ....., (February 3, 1947), as follows:

"The Commission made no finding that the cash value of the securities allocated to the senior creditors

paid them in full. To justify the change of position of creditors from fully secured to partially secured, creditors were given opportunities to participate in profits through common stock ownership *with a chance at larger earnings than the Commission's forecast anticipated*. We held the priority rule was satisfied by this type of allocation. This was explained by our decision on the last review. Slip opinion, *supra*, p. 15. The debtor has made no allegation, either in this effort for re-examination or before, that the existing cash value of the securities allotted any creditor has ever aggregated the amount of the creditor's claim against the debtor. We think the absence of such an allegation, of itself, demonstrates that the plan is not, because of excessive interest, unfair to the debtor or those for whom it is allowed to appear.

"Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, the debtor's insistence on a re-examination of the plan is without substantial support."

The petitioners have submitted no facts to show either (a) that the war and post-war earnings and their results were not, and could not have been, envisaged by the Commission, or (b) stating it differently, that the war and post-war earnings and their results are such as to require the court to exercise its general equity power to set aside a plan, fair when adopted, on the grounds that events subsequent to its adoption make it grossly inequitable, or (c) that the cash value of the securities allocated to the senior creditors paid them in full. Rather, the record supports the plan of the Commission. Over a twenty-four year period, the average earnings of the debtor would only have made available for the proposed common stock to be issued under

the plan, annual earnings of approximately $7.82 per share.[4] Such earnings would hardly seem to justify, much less *require*, such exercise of a general equitable power and further, seem to indicate that the Commission must have envisaged the large war and post-war earnings.

Under the plan, the earliest maturity of any debt of any consequence is that of the First Mortgage Certificates in 1989, (the new Consolidated Mortgage Bonds are not to mature until 1992). Hence, the Interstate Commerce Commission must have been considering a financial structure

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[4] This computation makes no adjustments (a) to conform any of the Debtor's figures to those authorized by the Interstate Commerce Commission, (b) for increase in Federal income taxes had the Debtor's interest charges been the lower amounts called for by the plan, nor (c) for the recent rate increase. The figures for the years 1923-1944, inclusive are from R. 5657, for the year 1945, from R. 5727, and for 1946 from the estimate on page 11 of the petition herein of Southern Pacific Company. The figure of Undisturbed fixed charges eliminates the interest on the Railroad Credit Corporation notes.

| | | | |
|---|---|---|---|
| 1923 | $5,929,628 | 1935 | $2,695,111 |
| 1924 | 5,028,749 | 1936 | 3,333,243 |
| 1925 | 5,057,460 | 1937 | 2,304,505 |
| 1926 | 5,072,628 | 1938 | 2,088,299 |
| 1927 | 4,692,923 | 1939 | 1,199,158 |
| 1928 | 4,382,449 | 1940 | 2,860,221 |
| 1929 | 3,714,052 | 1941 | 7,495,940 |
| 1930 | 2,380,379 | 1942 | 8,692,636 |
| 1931 | 2,710,861 | 1943 | 10,562,547 |
| 1932 | (125,857) | 1944 | 11,133,608 |
| 1933 | 1,840,184 | 1945 | 7,001,641 |
| 1934 | 2,024,891 | 1946 | 7,000,000 |

| | | |
|---|---|---|
| Average income of the twenty-four years 1923 to 1946, inclusive | | $4,544,802 |
| Less charges under plan (R. 3785, 3797, 3798): | | |
| Undisturbed fixed charges | $872,970 | |
| New mortgage interest | 587,501 | |
| Capital fund | 500,000 | |
| Sinking fund | 179,763 | |
| Preferred dividends | 937,505 | 3,077,739 |
| Available for common dividends | | $1,467,063 |
| Earnings per common share | | $7.82 |

which would weather the possible vissisitudes of almost half a century, and it might well contemplate further wars and major depressions during that period. A capitalization which, over a twenty-four year period including a boom, a major depression and a war boom, only averages $7.82 per share for the common stock, supports the wisdom and experience of the Interstate Commerce Commission.

The petitioners urge that because the plan in this reorganization has been criticized before Congress, this Court should order the plan referred back to the Interstate Commerce Commission. In the first *Denver & Rio Grande* Case, *supra*, this Court restated its duty as one to follow the dictates of Congress and not to attempt to anticipate Congressional action. This Court said (1. c. 90 L. ed. 1139-1141):

> "The agencies employed by Congress to accomplish reorganizations under Section 77 were the Interstate Commerce Commission and the courts. The answer reached by Congress was that the experience and judgment of the Commission must be relied upon for final determinations of value and of matters affecting the public interest, subject to judicial review to assure compliance with Constitutional and statutory requirements. * * *

(1. c. 90 L. ed. 1142-1143):

> "* * * Our constructions of the chief provisions of the section were handed down in March, 1943. Although the results of reorganizations under the section as thus construed, have been criticized as unfortunate and changes have been suggested, no different legislation has been enacted. Indeed a different method for reorganization, enacted in 1939 and designed to meet the requirements of railroads not in need of financial reorganization of the character provided by Section 77 but only of an opportunity for voluntary adjustments with their creditors, terminated on July 31, 1940, and a comparable provision made in 1942 was allowed to

> lapse on November 1, 1945.[5] This situation leaves clear the duty of the agencies of the Government entrusted with the handling of reorganizations under Section 77, including this Court, to administer its provisions according to their best understanding of the purposes of Congress as expressed in the words of Section 77 read in the light of the contemporaneous discussion in Congress."

The obligation of this Court to ignore public pressure and to act under the existing law, and to refrain from attempting to anticipate Congressional action, was reaffirmed by this Court in *Insurance Group Committee v. The Denver & Rio Grande Western Railroad Company*, ..... U. S. ..... (February 3, 1947), where it said:

> "* * * Nor do we see that the action of Congress in passing S. 1253, on July 31, 1946, should persuade us to require a stay to await further enactments that might affect this reorganization. It was vetoed. President's Memorandum of Disapproval, August 13, 1946. Our understanding of our duties under the Railroad Reorganization Act, in the face of strong criticism of its provisions, was expressed in the former review of this plan, slip opinion, p. 9. It need not be repeated. We must continue to act under the now existing law. Whether or not changes may be made that will affect this reorganization, we do not know."

In addition, this Court has expressed its appreciation of the Congressional purpose to eliminate delays in rail-

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[5] Similar legislation, embodied in S. 249, is now before Congress. This proposed law does not apply to reorganizations of railroads now in receivership proceedings or under Section 77, and thus differs materially from the vetoed legislation discussed at length by Mr. Justice Frankfurter in his dissent in *Insurance Group Committee v. The Denver & Rio Grande Western Railroad Company*, ..... U. S. ..... (February 3, 1947). Furthermore, this difference would seem to support the decision of the majority in that case that this Court must continue to act under the now existing law. S. 249 is printed as Appendix B hereto.

road reorganizations. As pointed out above, this debtor has been in reorganization more than twelve years, including more than five years before the Interstate Commerce Commission. If these proceedings are referred back to the Commission, twelve years will in large part be lost, with no assurance that some litigious person will not again unduly delay these proceedings.

Another result of such referral might well be a plan formulated by the Interstate Commerce Commission during abnormally good years, but which would reach this Court during depression years, and therefore be referred back to the Interstate Commerce Commission a third time. The only escape of the debtor from such a vicious circle would be a dismissal under Section 77(g) (11 U. S. C. §205 (g)), which might leave the debtor still unable to meet its debts and still unreorganized.

## CONCLUSION.

It is respectfully submitted that a writ of certiorari should not issue.

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Dated: February 11, 1947.

## APPENDIX A.

*11 U. S. C. §205 (d)(e) and (g):*

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem

necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge,

except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate

action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided,* That, if the plan has not been so accepted by the creditors and

stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

"(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order."

## APPENDIX B.

80TH CONGRESS
1ST SESSION

S. 249

IN THE SENATE OF THE UNITED STATES

JANUARY 15, 1947

MR. WHITE (by request) introduced the following bill; which was read twice and referred to the Committee on Interstate and Foreign Commerce

A BILL

To amend the Interstate Commerce Act, as amended, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it is hereby declared to be in aid of the national transportation policy of the Congress, as set forth in the preamble of the Interstate Commerce Act, as amended, in order to promote the public interest in avoiding the deterioration of service and the interruption of employment which inevitably attend the threat of financial difficulties and which follow upon financial collapse and in order to promote the public interest in increased stability of values of railroad securities with resulting greater confidence therein of investors, to assure, insofar as possible, continuity of sound financial condition of common carriers subject to part I of said Act, and to enable said common carriers, insofar as possible, to avoid prospective financial difficulties, inability to meet debts as they mature, and insolvency. To assist in

accomplishing these ends and because certain classes of the obligations of such carriers are in the usual case held by a very large number of holders, and further to enable modification and reformation of provisions of the aforesaid classes of obligations and of provisions of the instruments pursuant to which they are issued or by which they are secured in cases where such modification and reformation shall have become necessary or desirable in the public interest in order to avoid obstruction to or interference with the economical, efficient, and orderly conduct by such carriers of their affairs, it is deemed necessary to provide means, in the manner and with the safeguards herein provided, for the alteration and modification, without the assent of every holder thereof, of the provisions of such classes of obligations and of the instruments pursuant to which they are outstanding or by which they are secured.

Part I of the Interstate Commerce Act, as amended, is amended by adding after section 20a the following new section:

"20b. (1) It shall be lawful (any express provision contained in any mortgage, indenture, deed of trust, or other instrument to the contrary notwithstanding), with the approval and authorization of the Commission, as provided in paragraph (2) hereof, for a carrier as defined in section 20a (1) of this part (other than a carrier in equity receivership or in process of reorganization under section 77 of the Bankruptcy Act) to alter or modify (a) any provision of any class or classes of its bonds, notes, debentures, or other evidences of indebtedness (whether secured, unsecured, matured, or unmatured) issued under any mortgage, indenture, deed of trust, or other instrument of like nature, such bonds, notes, debentures, or other evidences of indebtedness being hereinafter in this section sometimes called 'obligations'; (b) any provision of any mortgage, indenture, deed of trust, or other instrument pursuant to which any class of its obligations shall have been issued or by which any class of its obligations is secured: *Provided*, That the provisions of this section shall not apply to any equipment-trust certi-

ficates in respect of which a carrier is obligated, or to any evidences of indebtedness of a carrier the payment of which is secured in any manner solely by equipment, or to any instrument, whether an agreement, lease, conditional-sale agreement, or otherwise, pursuant to which such equipment-trust certificates or such evidences of indebtedness shall have been issued or by which they are secured.

"(2) Whenever an alteration or modification is proposed under paragraph (1) hereof, the carrier seeking authority therefor shall, pursuant to such rules and regulations as the Commission shall prescribe, present an application to the Commission. Upon presentation of any such application, the Commission may, in its discretion, but need not, as a condition precedent to further consideration, require the applicant to secure assurances of assent to such alteration or modification by holders of such percentage of the aggregate principal amount outstanding of the obligations affected by such alteration or modification as the Commission shall in its discretion determine. If the Commission shall not require the applicant to secure any such assurance, or when such assurances as the Commission may require shall have been secured, the Commission shall set such application for public hearing and the carrier shall give such notice of such hearing in such manner, by advertisement or otherwise, as the Commission may find practicable and may direct, to holders of such of its classes of securities and to such other persons in interest as the Commission shall determine to be appropriate and shall direct. If the Commission, after hearing, in addition to making (in any case where such alteration or modification involves an issuance of securities) the findings required by paragraph (2) of section 20a, shall find that, subject to such terms and conditions and with such amendments as it shall determine to be just and reasonable, the proposed alteration or modification—

"(a) is within the scope of paragraph (1);

"(b) will be in the public interest;

"(c) will be in the best interests of the carrier, of each class ot its stockholders, and of the holders of each class of its obligations affected by such modification or alteration; and

"(d) will not be adverse to the interests of any creditor of the carrier not affected by such modification or alteration

then (unless the applicant carrier shall withdraw its application) the Commission shall cause the carrier, in such manner as it shall direct, to submit the proposed alteration or modification (with such terms, conditions, and amendments, if any) to the holders of each class of its obligations affected thereby, for acceptance or rejection. All letters, circulars, advertisements, and other communications, and all financial and statistical statements, or summaries thereof, to be used in soliciting the assents or the opposition of such holders shall, before being so used, be submitted to the Commission for its approval as to correctness and sufficiency of the material facts stated therein. If the Commission shall find that as a result of such submission the proposed alteration or modification has been assented to by the holders of at least 75 per centum of the aggregate principal amount outstanding of each class of obligations affected thereby (or in any case where 75 per centum thereof is held by fewer than twenty-five holders, such larger percentage, if any, as the Commission may determine to be just and reasonable and in the public interest), the Commission shall enter an order approving and authorizing the proposed alteration or modification upon the terms and conditions and with the amendments, if any, so determined to be just and reasonable. Such order shall make provision as to the time when such alteration or modification shall become and be binding, which may be upon publication of a declaration to that effect by the carrier, or otherwise, as the Commission may determine. Any alteration or modification which shall become and be binding pursuant to the approval and authority of the Commission hereunder shall be binding upon each holder of any obligation of the carrier of each class affected by such alteration

or modification, and upon any trustee or other party to any instrument under which any such class of obligations shall have been issued or by which it is secured, and when any alteration or modification shall become and be binding the rights of each such holder and of any such trustee or other party shall be correspondingly altered or modified.

"(3) For the purposes of this section a class of obligations shall be deemed to be affected by any modification or alteration proposed only (a) if a modification or alteration is proposed as to any provision of such class of obligations, or (b) if any modification or alteration is proposed as to any provision of any instrument pursuant to which such class of obligations shall have been issued or shall be secured: *Provided*, That in any case where more than one class of obligations shall have been issued, and be outstanding or shall be secured pursuant to any instrument, any alteration or modification proposed as to any provision of such instrument which does not relate to all of the classes of obligations issued thereunder, shall be deemed to affect only the class or classes of obligations to which such alteration or modification is related. For the purpose of the finding of the Commission referred to in paragraph (2) of this section as to whether the required percentage of the aggregate principal amount outstanding of each class of obligations affected by any proposed alteration or modification has assented to the making of such alteration or modification, any obligation which secures any evidence or evidences of indebtedness of the carrier or of any company controlling or controlled by the carrier shall be deemed to be outstanding unless the Commission in its discretion determines that the proposed alteration or modification does not materially affect the interests of the holder or holders of the evidence or evidences of indebtedness secured by such obligation. Whenever any such pledged obligation is, for said purposes, to be deemed outstanding, assent in respect of such obligations, as to any proposed alteration or modification, may be given only (any express or implied provision in any mortgage, indenture, deed of trust, note, or other instrument to the contrary notwithstanding) as

follows: (a) Where such obligation is pledged as security under a mortgage, indenture, deed of trust, or other instrument, pursuant to which any evidences of indebtedness are issued and outstanding, by the holders of a majority in principal amount of such evidences of indebtedness; or (b) where such obligation secures an evidence or evidences of indebtedness not issued pursuant to such a mortgage, indenture, deed of trust, or other instrument, by the holder or holders of such evidence or evidences of indebtedness; and in any such case the Commission, in addition to the submission referred to in paragraph (2) of this section, shall cause the carrier in such manner as it shall direct to submit the proposed alteration or modification (with such terms, conditions, and amendments, if any, as the Commission shall have determined to be just and reasonable) for acceptance or rejection, to the holders of the evidences of indebtedness issued and outstanding pursuant to such mortgage, indenture, deed of trust, or other instrument, or to the holder or holders of such evidence or evidences of indebtedness not so issued, and such proposed alteration or modification need not be submitted to the trustee of any such mortgage, indenture, deed of trust, or other instrument, but assent in respect of any such obligation shall be determined as hereinbefore in this section provided. For the purposes of this section an obligation or an evidence of indebtedness shall not be deemed to be outstanding if in the determination of the Commission the assent of the holder thereof to any proposed alteration or modification is within the control of the carrier or of any person or persons controlling the carrier.

"(4) (a) Any authorization and approval hereunder of any alteration or modification of a provision of any class of obligations of a carrier or of a provision of any instrument pursuant to which a class of obligations has been issued, or by which it is secured, shall be deemed to constitute authorization and approval of a corresponding alteration or modification of the obligation of any other carrier which has assumed liability in respect of such class of obligations as guarantor, endorser, surety, or otherwise: *Pro-*

*vided*, That such other carrier consents in writing to such alteration or modification of such class of obligations in respect of which it has assumed liability or of the instrument pursuant to which such class of obligations has been issued or by which it is secured and, such consent having been given, any such corresponding alteration or modification shall become effective, without other action, when the alteration or modification of such class of obligations or of such instrument shall become and be binding.

"(b) Any person who is liable or obligated contingently or otherwise on any class or classes of obligations issued by a carrier shall, with respect to such class or classes of obligations, for the purposes of this section, be deemed a carrier.

"(5) The authority conferred by this section shall be exclusive and plenary and any carrier, in respect of any alteration or modification authorized and approved by the Commission hereunder, shall have full power to make any such alteration or modification and to take any actions incidental or appropriate thereto, and may make any such alteration or modification and take any such actions, and any such alteration or modification may be made without securing the approval of the Commission under any other section of this Act or other paragraph of this section, and without securing approval of any State authority, and any carrier and its officers and employees and any other persons, participating in the making of an alteration or modification approved and authorized under the provisions of this section or the taking of any such actions, shall be, and they hereby are, relieved from the operation of all restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to make and carry into effect the alteration or modification so approved and authorized, in accordance with the conditions and with the amendments, if any, imposed by the Commission. Any power granted by this section to any carrier shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State. The provisions of this section shall not

affect in any way the negotiability of any obligation of any carrier or of the obligation of any carrier which has assumed liability in respect thereto.

"(6) The Commission shall require periodical or special reports from each carrier which shall hereafter secure from the Commission approval and authorization of any alteration or modification under this section, which shall show, in such detail as the Commission may require, the action taken by the carrier in the making of such alteration or modification.

"(7) The provisions of this section are permissive and not mandatory and shall not require any carrier to obtain authorization and approval of the Commission hereunder for the making of any alteration or modification of any provision of any of its obligations or of any class thereof or of any provision of any mortgage, indenture, deed of trust, or other instrument, which it may be able lawfully to make in any other manner, whether by reason of provisions for the making of such alteration or modification in any such mortgage, indenture, deed of trust, or other instrument, or otherwise: *Provided*, That the provisions of paragraph (2) of section 20a, if applicable to such alteration or modification made otherwise than pursuant to the provisions of this section, shall continue to be so applicable.

"(8) The provisions of paragraph (6) of section 20a, except the provisions thereof in respect of hearings, shall apply to applications made under this section. In connection with any order entered by the Commission pursuant to paragraph (2) hereof, the Commission may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any such order, subject always to the requirements of said paragraph (2).

"(9) The provisions of subdivision (a) of section 14 of the Securities Exchange Act of 1934 shall not apply to any solicitation in connection with a proposed alteration or modification pursuant to this section.

"(10) The Commission shall have the power to make such rules and regulations appropriate to its administration of the provisions of this section as it shall deem necessary or desirable."